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Chairman: Mr. Ganeson (Vice-Chairman) ..... (Malaysia)

Contents

Report of the International Law Commission on the work of its fifty-eighth session (*continued*)

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In the absence of the Chairman, Mr. Ganeson (Malaysia), Vice-Chairman, took the Chair

The meeting was called to order at 10.40 a.m.

Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Tladi** (South Africa) said the Commission's report on fragmentation of international law reflected the undeniable truth that the problem of fragmentation was a real and practical one, and not merely of academic interest. It arose in part from the mushrooming of so-called "self-contained" regimes. The term "self-contained" should however be avoided, because it implied the complete separation of those regimes, as if they were immune from outside influence. It would be better to refer to "separate" or "specialized" fields of international law. The positive effects of such specialized fields could be seen from the development of international environmental law, through which declarations such as the Rio Declaration on Environment and Development had acquired a greater degree of significance. That explained why the precautionary principle was now generally recognized as part of international law, even outside the ambit of treaty law. The concept of sustainable development, also derived from international environmental law, had likewise extended its reach to include trade law, human rights law, economic law and development law.

2. The Commission had however correctly recognized that fragmentation had its dangers and that they probably outweighed the positive effects. The proliferation of adjudicatory bodies, sometimes with overlapping jurisdictions, had a distinct impact on the integrity of international law. The Commission and the Sixth Committee should therefore remain alert to the institutional problems arising from fragmentation, notwithstanding the decision of the Study Group to the contrary (para. 245 of the report).

3. The World Trade Organization (WTO) had a specialized, perhaps even a "self-contained", regime, probably because of its compulsory adjudicatory procedure. Although WTO dispute settlement bodies had often made reference to article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties, those bodies were constrained by their own terms of reference, such as article 7 of the WTO Dispute Settlement Understanding. In the *Beef Hormones* case the WTO Appellate Body, when considering the relationship between the precautionary principle and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), had concluded that the principle could not, "in the absence of a clear textual directive", exempt the panel from applying the terms of the Agreement. Similar arguments had been advanced and accepted before the WTO panel in *EC: Measures Affecting the Approval and Marketing of Biotech Products*. That implied that WTO law could be influenced only to a limited extent by other areas of international law, even by general international law itself. WTO law must therefore be given special attention when studying the impact of specialized fields of international law on the integrity of the system.

4. Turning to the effects of armed conflicts on treaties, he welcomed the decision of the Special Rapporteur to consider including internal armed conflicts within the scope of the draft articles. Internal conflicts were more common in the modern world than international ones and were capable of having the same effects. States should not, of course, be encouraged to avoid their international obligations on account of armed conflict, whether internal or international. Fortunately, draft articles 3 and 4 emphasized that the mere existence of an armed conflict did not result in extinguishing treaty obligations.

5. **Mr. Vargas Carreño** (Chile), commenting on the draft articles on diplomatic protection, welcomed the decision of the Special Rapporteur not to require the beneficiary of diplomatic protection to have "clean hands". International practice showed that more was to be lost than gained from such a requirement.

6. He endorsed the approach of the Special Rapporteur to the topic of reservations to treaties and expressed agreement with the recommendation for a meeting with United Nations human rights experts to discuss issues relating to reservations to human rights treaties. Those treaties were of a special kind and different in many respects from ordinary treaties. That was the view of the Inter-American Court of Human Rights, which had issued an advisory opinion on the matter (The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (arts. 74 and 75), Advisory Opinion OC-2/82). If the funds could be obtained, it would be useful to bring to the meeting experts with wide experience of the question from regional human rights bodies in Europe, the Americas and Africa.

7. Concerning the effects of armed conflicts on treaties, his delegation took the view that the topic was part of the law of treaties, albeit with linkages to international humanitarian law, the prohibition of the use and threat of force in international relations, and the international responsibility of States. However, the norms enshrined in the Vienna Convention on the Law of Treaties, such as those on supervening impossibility of performance, were not sufficient in themselves. If the aim of the topic was to lend stability to treaties, the rule of continuity proposed in draft article 7, paragraph 1, would be fundamental. However, the list of categories of treaties given in draft article 7, paragraph 2, could well be replaced by an annex summarizing State practice and jurisprudence in the matter. The draft should also contain an explicit reference to human rights treaties and those forming part of international humanitarian law.

8. Concerning the obligation to extradite or prosecute (*aut dedere aut judicare*), he endorsed the approach taken by the Special Rapporteur and noted that the Commission, when considering what was then the draft Code of Offences against the Peace and Security of Mankind, had declared that the purpose of that obligation was to ensure that persons responsible for serious crimes were submitted to justice, allowing for their prosecution and effective punishment by the competent jurisdiction. In other words, the intention was to prevent impunity for serious international crimes and to confer jurisdiction to prosecute or extradite on the State where the presumed offender was found. As the Special Rapporteur pointed out, the case could also be referred to an international tribunal. It might be difficult to determine whether the obligation to extradite or prosecute derived from customary international law. In that connection, the Special Rapporteur and the Commission would have to give careful consideration to the question of the exercise of universal criminal jurisdiction and that of determining which of two or more States interested in exercising jurisdiction should have priority. His view in the latter case was that preference should be given to the State on whose territory the crime had been committed.

9. He welcomed the Commission's decision to include in its long-term programme of work the question of extraterritorial jurisdiction. The evident relationship between that topic and the obligation to extradite or prosecute would require coordination between the two Special Rapporteurs.

10. **Mr. Kaewpanya** (Thailand), commenting on the obligation to extradite or prosecute (*aut dedere aut judicare*), said that many States failed either to prosecute or to extradite offenders because they lacked jurisdiction over the offences committed. To ensure that the obligation was complied with in practice, the Commission must consider making universal jurisdiction the basis for it. That would enable States without jurisdiction over the offence or the offender to become seized of the matter. The Commission should also consider situations in which a requested State could not or did not extradite an offender (for instance, those in which the offender was one of its nationals or the offence carried the death penalty in the requesting State). The crimes to which the obligation to extradite or prosecute should apply could be those recognized under customary international law and serious offences relating to aircraft, narcotic drugs and terrorism.

11. **Ms. McIver** (New Zealand), commenting on the topic of reservations to treaties, said that her delegation saw no particular difficulty in the draft guidelines or the commentaries thereto. She looked forward to the Commission's further consideration of the draft guidelines on the definition of the object and purpose of the treaty and the determination of the validity of reservations. The Commission's preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, adopted at its forty-ninth session, offered a generally satisfactory statement of principles on that subject. She endorsed the recommendation for a meeting with United Nations human rights experts, especially those who had to deal with reservations.

12. She commended the Commission on completing the Guiding Principles on unilateral acts of States. The principles would encourage States to conduct their relations and resolve their disputes through dialogue, while exercising due care in making declarations on which other States might rely. It was clear from the preamble and from draft principle 3 that in some circumstances, a unilateral act might result in a State being bound by its actions even though such might not have been its intent.

13. In dealing with the obligation to extradite or prosecute (*aut dedere aut judicare*), the Special Rapporteur had recognized the need to start from a thorough analysis of the international treaty obligations and national laws bearing upon the obligation. The Commission's further consideration of the topic would,

she hoped, establish a clearer focus for future work on the topic.

14. Welcoming the adoption of the conclusions of the Study Group on fragmentation of international law, she said the Commission's work on the topic was an impressive achievement which contributed to wider understanding of the underlying linkages and overall coherence of the international legal system. The work of the Study Group would help legal advisers to think through and deal with issues of fragmentation. The conclusions were a good example of the valuable non-traditional kinds of work which the Commission might undertake in future.

15. **Ms. Goldsmith** (Australia) commended the work done by the Commission to develop Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. Her Government had maintained a strong interest in that issue since its involvement in the *Nuclear Tests* cases before the International Court of Justice, when France had unilaterally declared that it would cease atmospheric tests. Her delegation endorsed the view expressed in draft principle 3 that the context in which such declarations were made needed to be taken into account; it was also important to consider the intention behind them and to regard them as binding only if made by an authority vested with the necessary power, as recognized in draft principles 1 and 4. The circumstances in which the revocation of a declaration could be said to be arbitrary would benefit from further clarification.

16. On the topic of reservations to treaties, which had raised some conceptually difficult questions, such as that of concisely defining the object and purpose of a treaty, she welcomed the stipulation in draft guideline 3.1.3 that a reservation must not be incompatible with such object and purpose. It was fitting that the Commission should take into account developments in international law and practice since the drafting of the Vienna Convention on the Law of Treaties.

17. It was not however appropriate for treaty-monitoring bodies to assess the validity of reservations, as suggested in draft guideline 3.2.1; any such assessment made by a treaty-monitoring body would in most cases be an expression of a view on the matter rather than a binding determination. The role of such bodies was to assess a State party's implementation of the treaty concerned and not the basis on which it had become a party thereto. Moreover, giving them such a role would exacerbate the problem of conflicting conclusions being reached by bodies asserting competency in the matter. The requirement in draft guideline 2.1.8 that the depositary should arrive at its own legal view on the nature of a reservation and duly advise States parties went beyond the depositary's role as set out in article 77 of the Vienna Convention on the Law of Treaties. Where, however, the depositary was also a State party to a treaty, it could communicate its views as to the validity of a reservation in its capacity as a State party, but it could not rule thereon. Her delegation therefore recommended that the Commission should consider draft guidelines 3.2.1 and 2.1.8 carefully at its next session.

18. **Mr. Sinaga** (Indonesia) welcomed the opportunity to discuss the various issues raised by the Commission before its draft recommendations became hard law. The principle of *aut dedere aut judicare*, which in general related to crimes within the scope of universal jurisdiction, had been incorporated into many human rights treaties and, in recent times, into conventions to combat terrorism and other transnational crimes. He agreed that the most crucial question in that regard was whether the obligation to extradite or prosecute should be limited to binding treaties or be extended to appropriate customary norms and general principles of law. It was also relevant to note the existence of bilateral arrangements for extradition and the double criminality principle. Some States limited extradition to capital offences or to certain economic crimes, but that limitation could conflict with their obligation to combat crimes by virtue of the universal jurisdiction principle or under international conventions.

19. The draft articles on the effects of armed conflicts on treaties were applicable solely in situations of armed conflict of an international character, in keeping with the wording of draft article 1 and draft article 2, subparagraph (b). Arguments, based on the *Tadić* case, to broaden the scope of application of the draft to include situations of internal conflict, were not convincing.

20. On the topic of responsibility of international organizations, he noted that, as subjects of international law, such organizations had indeed affected the norm-setting rules of international relations in both their collective dealings with member States and their individual dealings with countries with which they concluded agreements. The complexity of the issue was reflected in the fact that few organizations had a supranational structure. A formula should therefore be found that would take account of the different structures of international organizations. As for the draft articles regulating the breach of an international obligation, they should so far as possible be based on the articles on responsibility of States for internationally wrongful acts, supplemented as necessary. That approach would be particularly relevant in determining the subsidiary, and possibly varying degrees of, responsibility of member States in the case of wrongful acts committed by organizations.

21. With regard to shared natural resources, the Commission was prudent to focus for the time being on the issues of non-renewable water in confined groundwater. The 1997 Watercourses Convention should serve as a framework for elaborating further elements of recharging aquifers but should be supplemented by other relevant sources since it had not yet come into force. Upon completion of that study, the Commission could undertake another one to develop principles for oil and natural gas. As one kind of natural resource, the transboundary aquifer should be subject to the national jurisdiction of the aquifer States. His delegation supported draft article 3, which was consistent with General Assembly resolution 1804 (XVII) on permanent sovereignty over natural resources, and agreed that arrangements among aquifer States, whether binding or non-binding, should have priority over any other instrument. It was reasonable to expect States sharing transboundary groundwater to cooperate in its management in view of its vital importance for people living in the border areas. He therefore welcomed the Commission's decision to include in draft article 5 a non-exhaustive list to guide utilization of that vital resource. With regard to draft article 18, States needed more time to reflect on the obligation to share information since it might conflict with national legislation concerning the confidentiality status of certain types of information.

22. In its future work, the Commission should concentrate on issues that were close to completion and select topics, such as extraterritorial jurisdiction, that would complement existing studies.

23. **Mr. Makarewicz** (Poland) noted the limited progress made on the topic "Effects of armed conflicts on treaties" and agreed that the best way forward would be for the Rapporteur to prepare a third report which could, together with the first two reports, form the basis for its future consideration. The work of the Commission so far had rightly focused on whether such conflicts caused relevant treaties to be terminated, suspended or in operation. However, it was also important to consider the question of the legal regime governing treaty issues during armed conflict. In cases of termination, the consequences needed to be determined; in cases of suspension, the consequences needed to be regulated; in cases where the treaties were in operation, their implementation and interpretation needed to be governed by a set of rules; and where new treaties were concluded between belligerents, rules on treaty-making were required.

24. The Vienna Convention on the Law of Treaties should apply to treaty issues arising during armed conflict in view of its article 73, which conferred upon it a residual status, notwithstanding the primacy of more specific rules agreed by the parties involved. The Vienna Convention itself was a prime example of a multilateral law-making treaty whose object and purpose necessarily implied that it should continue to be in operation. The Special Rapporteur's first two reports on the topic suggested that it was not operative on its own. To dispel any confusion, his delegation suggested the inclusion in the draft articles of a more general provision on the applicability of the Vienna Convention, worded along the following lines: "The outbreak of an armed conflict does not affect the operation of the rules established by the Vienna Convention on the Law of Treaties, which continue to govern treaty matters between the belligerent parties and between the belligerent party and a third State, unless such a continuous operation would be incompatible with the present articles". The draft articles under consideration would then become a *lex specialis*, while the Vienna Convention, with which they would thereby be entwined, would preserve its status as *lex generalis*, thus creating a coherent and logical system of the law of treaties applicable in time of peace and in time of war. Upon completion of the current work, the effects on the Vienna Convention of the new regime governing the situation at the outbreak of armed conflict should be clear.

25. As important as it was to consider the effects of armed conflicts on treaties, it was equally so to ascertain the effects of the outbreak of armed conflict on particular provisions of treaties. Attention should accordingly be centred on the character of particular

treaty obligations in order to determine the criteria for their continuous operation during armed conflict. The rules on separability of treaty provisions would need to be taken into account in that connection, to which end article 44 of the Vienna Convention could serve as a framework; however, there might also be a need to introduce more specific provisions applicable in times of armed conflict. A concern with particular treaty obligations rather than, or in addition to, treaties as a whole might help to maintain the principle of *pacta sunt servanda*.

26. On the topic of *aut dedere aut judicare*, the road map proposed by the Special Rapporteur for the Commission's future work was realistic and acceptable. He agreed that the Special Rapporteur should, with the assistance of the secretariat, undertake a systematic study of State practice, focusing on contemporary practice, including national jurisprudence. It was important that Governments respond to the questions addressed to them in chapter III of the Commission's report. Poland, for its part, would communicate the required information as soon as possible.

27. He referred, lastly, to the final report of the Study Group on fragmentation of international law, whose 42 conclusions were of great value for States, as they showed how to treat that phenomenon as a positive element of contemporary international law. He supported the proposal that the finalized analytical study on the topic should be made available on the Commission's website and also published in its *Yearbook*.

28. **Mr. Saradgi** (India) said that, as the topic of the effects of armed conflicts on treaties was closely related to other domains of international law, it was not possible to maintain a strict separation between the law of treaties and other relevant branches of international law. The scope of the topic should be limited to treaties concluded between States and should not include those concluded by international organizations. The definition of "armed conflict" in draft article 2 should be considered independently of its effects on treaties; its scope should be limited to conflicts between States and not extend to internal conflicts. In cases where the operation of a treaty was indirectly affected by an internal conflict, the effects could be dealt with within the framework of the 1969 Vienna Convention on the Law of Treaties. While the intention of the parties was relevant for interpretation of a treaty, such intention was to be determined from its text and from the context in which it had been adopted. All other relevant circumstances should be taken into account in order to determine whether the treaty or some of its provisions could continue to be in force during armed conflict and ascertain the legality of the actions of each of the belligerents.

29. The listing in draft article 7 of categories of treaties regarded as remaining in operation during armed conflict would raise the presumption that treaties outside those categories would automatically lapse. It might therefore be preferable to identify general criteria for determining the types of treaties that would continue to apply during armed conflict; those that could in no circumstances be terminated should be considered separately, while those that could be suspended or terminated during armed conflict should be identified.

30. The obligation to extradite or prosecute was enshrined in many international conventions to which India was a party. While none of them specifically permitted reservations to that obligation, the law of a State party might not allow extradition in the absence of a bilateral extradition treaty. Under Indian law, extradition could be based on a bilateral agreement or multilateral convention or could be determined case by case and could be granted for all offences carrying a penalty of at least one year's imprisonment. Since, however, a prima facie case must first be established, the obligation to prosecute would arise only after it was established that all requirements for extradition had been met.

31. With regard to the topic on fragmentation of international law, he commended the Commission for its work, in particular for the 42 conclusions reached by the Study Group; they should prove very useful to practitioners and legal advisers as guidelines in dealing with the practical consequences of the widening scope and expansion of international law.

32. **Mr. Panahi Azar** (Islamic Republic of Iran), commenting on the draft articles on the effects of armed conflicts on treaties, said that the task of the Commission was to supplement existing international instruments such as the Vienna Convention on the Law of Treaties, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, and the articles on responsibility of States for

internationally wrongful acts. He agreed with the Special Rapporteur that the topic was not part of the law relating to the use of force. It fell within several domains of international law, including the law of treaties, international humanitarian law, the responsibility of States and self-defence. Military occupation should not be included within the definition of "armed conflict" in draft article 2 (b). Nor should the definition include internal armed conflicts, which would unduly broaden the scope of the term. He noted in that connection that the articles on responsibility of States for internationally wrongful acts already made provision, in chapter V, for circumstances precluding wrongfulness. However, he endorsed the inclusion in draft article 4 of the concept of "the intention of the parties" to treaties. That was a key factor in determining the validity of a treaty in the event of an armed conflict. It could be ascertained from the text of the treaty, including its preamble and annexes, and also from the *travaux préparatoires* of the treaty and the circumstances of its conclusion.

33. Draft article 4 drew no distinction between a State resorting to the unlawful use of force, contrary to the Charter of the United Nations, and a State exercising the inherent right of self-defence. Putting them on an equal footing would be tantamount to recognizing an unlawful act. The Institute of International Law, in its resolution on the effects of armed conflicts on treaties, had decided that States should be entitled to suspend, in whole or in part, the operation of a treaty that was incompatible with their inherent right of self-defence. Such a distinction must be taken into account in the draft articles.

34. To preserve the integrity and continuity of international treaties, draft article 6 should be maintained, either intact or incorporated into draft article 4. The list of categories of treaties in draft article 7 could be reconsidered with a view to identifying common criteria for deciding which treaties should remain in operation during an armed conflict. As one possible criterion, he proposed the insertion in the draft article of obligations *erga omnes*.

35. **Mr. Astraldi** (Italy) said that the Commission seemed to be still grappling with the difficult task of defining the scope of the topic of the obligation to extradite or prosecute, since it touched on issues, such as universal criminal jurisdiction and the definition of international crimes, that would merit discussion as distinct topics in themselves. A priority task in the examination of the topic would be to make a comprehensive survey of the practice relating to treaties containing the obligation to extradite or prosecute.

36. His delegation looked forward to the third report on the effects of armed conflicts on treaties, as the Special Rapporteur had expressed his intention to provide a full analysis of practice to support his preliminary conclusions.

37. The Study Group on fragmentation of international law had developed an impressive set of 42 conclusions on the topic designed to provide state-of-the-art thinking on various issues of considerable theoretical difficulty, with appropriate references to the pertinent legal authorities. Although certain questions might not be directly relevant to the topic of fragmentation and some others would require a more thorough analysis, the conclusions made an important contribution to the unity of international law.

38. **Mr. Lamine** (Algeria) said, with reference to the topic of effects of armed conflicts on treaties, that internal armed conflicts did not directly affect relations between States parties but could have consequences that indirectly affected the performance of the treaty. Such obstacles or hindrances to implementation could be analysed within the framework of the 1969 Vienna Convention on the Law of Treaties. The same was true for conflicts of the "third kind", such as the "war on terrorism", which did not belong within the scope of the current topic. On the other hand, it would be necessary to include military occupations within the definition of armed conflicts, since they often constituted situations of protracted conflict.

39. With regard to draft article 4 on the indicia of susceptibility to termination or suspension of treaties in case of an armed conflict, in addition to the important element of the intention of the parties at the time the treaty had been concluded, it would be useful to consider the object and purpose of the treaty and the particular circumstances of the conflict. In connection with draft article 7, his delegation supported the proposal to replace the list given in paragraph 2 by an annex containing an analysis of State practice and case law.

40. During the previous session of the General Assembly his delegation had welcomed the inclusion of the topic of the obligation to extradite or prosecute in the Commission's agenda. The obligation offered

States the choice of two alternatives, and it was premature to consider a "triple alternative". Crimes defined only in domestic legislation should be excluded from the topic, but his delegation did not understand the point of the suggestion that a distinction should be drawn between crimes recognized under international customary law and crimes defined in treaty instruments (para. 220). The topic also necessitated study of the extradition procedure itself. The limitations to which extradition was subject were reflected in the plethora of sectoral conventions, notably on terrorism. Such limitations should not be allowed to hinder compliance with the obligation. On the question of universal jurisdiction, his delegation shared the Commission's view that the topic should focus on the obligation to extradite or prosecute, even while acknowledging that for some crimes the two concepts existed simultaneously. In such cases performance of the obligation based on universal jurisdiction would necessarily depend on the presence of the person sought in the territory of the forum State, for it was hard to conceive how a State could choose between extradition or prosecution of an individual if that individual was not physically present in its territory. As to form, delegation supported the proposal to elaborate draft articles on the topic.

41. **Ms. Wilcox** (United States of America) said that her delegation encouraged the Commission's continuing contributions in the law of treaties arena through its work on the effects of armed conflicts on treaties. In his second report (A/CN.4/570 and Corr.1) the Special Rapporteur had highlighted many of the questions that required careful study, including the scope of the draft articles, the definition of terms, the question of the parties' intent as to the effect of armed conflict at the time of the conclusion of the treaty and the problems involved in attempting to categorize specific treaties with respect to the effects of armed conflict. It was important to strive for an approach that preserved reasonable continuity of treaty obligations during armed conflict, taking into account particular military necessities. Rigid categorizations of treaties based on the alleged "intent" of the parties should be avoided, since in most instances the parties would not have had any particular intent about what should happen in the case of armed conflict. The most productive approach might be to enumerate the factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict.

42. On the topic of the obligation to extradite or prosecute, there were a number of threshold issues to be addressed, including the extent to which customary international law in that area was sufficiently established to warrant codification and progressive development and whether an obligation to extradite or prosecute was recognized outside the context of international conventions. Her delegation agreed with the many others that wanted the Commission to focus on obligations under existing treaties and begin its work with a study of State practice.

43. Her delegation appreciated the academic work done by the Study Group on the many challenging issues of fragmentation of international law, which would certainly stimulate much discussion in the field. However, it remained uneasy with the procedures used in dealing with the topic, including the limited opportunity for Governments to provide comments as the work had moved to a conclusion. Government comment should remain an important element in the Commission's work. Her delegation also had questions about the connection of the conclusions with the much longer analytical study, which appeared not to be a product of the Study Group as a whole. It nevertheless welcomed the Commission's decision to conclude work on the topic with those products, rather than to attempt to develop a more prescriptive set of principles, since it was not a fruitful field for progressive development.

44. **Mr. Wickremasinghe** (United Kingdom) said, with respect to the various problematic issues on which the Special Rapporteur on the effects of armed conflicts on treaties had sought the guidance of the Committee, that in the view of his delegation treaties involving international organizations were best not included in the scope of the topic, since there was a wide variety of international organizations, and it was doubtful whether their specificity and their treaty arrangements could be successfully dealt with. Moreover, the issues arising from armed conflict for international organizations might be very different from those arising for States. With regard to the definition of armed conflict in draft article 2, although the United Kingdom appreciated that internal armed conflicts could have a significant impact on a State's treaty relations, its preliminary view was that internal armed conflicts should be excluded. Article 73 of the Vienna Convention on the Law of Treaties referred only to the "outbreak of hostilities between States". If the topic was generally to be considered as lying within

the law of treaties, it would be consistent for the scope of the study to be limited to international armed conflicts. His delegation agreed with the decision not to abandon the concept of intention in draft article 4. Although there might be practical difficulties in ascertaining the intention of States parties, such problems were not insurmountable and were often of a type encountered by domestic courts. However, the Commission should also take other factors into account, while preserving the integrity of the rules of treaty interpretation in the Vienna Convention. Lastly, his delegation welcomed the decision to revisit draft article 7 to take into account the concerns of States.

45. On the topic of the obligation to extradite or prosecute, the United Kingdom would provide the requested information on national practice in due course. However it questioned why it had been felt necessary to concentrate on that particular aspect of international criminal law, which might have been considered as part of a broader study on jurisdiction, and what relationship it would bear to the topic of extraterritorial jurisdiction in the Commission's long-term programme of work. On the question of scope, while universal criminal jurisdiction might be of some relevance to the current study, it was a separate and distinct topic. Likewise, the current study should not include a review of extradition law or deportation. His delegation supported the suggestion that the study should be limited to the elaboration of secondary norms of international law. It should not cover the transfer of individuals to international criminal courts, since surrender to such bodies was governed by a distinct set of treaty arrangements and legal rules.

46. With regard to the status of the obligation to extradite or prosecute, his delegation was of the view that the obligation arose as a matter of treaty law only and was not a rule of customary international law. Even if the principle was held to have customary status, it would be in relation to a very limited class of crimes. The rule of extradite or prosecute should be viewed as a secondary norm of international law and was certainly not a *jus cogens* rule. Nevertheless, the study could be of potential value to States in the formulation of principles of priority or hierarchy among the different sources of obligations for States and the varying, and sometimes competing, bases of criminal jurisdiction. As to the final form of the output of the topic, it was premature to take a view, but his delegation would urge the Commission to be flexible.

47. The work on the fragmentation of international law had drawn considerable attention and was of interest to Governments, academics and practitioners alike. His delegation welcomed the completion of the analytical study and the Commission's decision to post it on its website, so that it would be available to a wide audience. With regard to the conclusions of the Study Group, the United Kingdom did not consider that the subject matter lent itself to any kind of prescriptive outcome, nor did it view the conclusions as stated as representative of customary international law or necessarily a desirable direction for progressive development. His delegation was concerned that the work had been conducted differently than usual in that Governments had not been given the opportunity to discuss the work as it progressed or to comment on proposals or drafts, and it hoped that in future Governments would be able to contribute to the work of the Commission in the normal manner.

48. **Mr. Mohd Radzi** Harun (Malaysia) said that the Special Rapporteur's formulation of concrete draft articles on effects of armed conflicts on treaties would make it easier to obtain comments and information from States on their contemporary practice. Draft article 1 on scope should be limited to treaties between States. It could be extended to cover treaties being provisionally applied unless the treaty expressly provided otherwise. Clarification would be appreciated on whether States would have the option to opt out of the proposed regime or parts thereof by special exclusion clauses.

49. In relation to draft article 2 on use of terms, the definition of "treaty", if considered necessary, should be consistent with the definition in the 1969 Vienna Convention on the Law of Treaties. If the scope was extended to treaties involving international organizations, the definition under article 2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations would have to be incorporated, which might present problems for countries not parties to the 1986 Convention.

50. The Commission need not embark on a comprehensive definition of "armed conflict"; a simple statement that the articles applied to armed conflicts, whether or not there had been a declaration of war, would provide the necessary flexibility to accommodate evolving types of armed conflicts, including internal armed conflicts and military

occupation. However, if a definition was considered necessary, the existing formulation was generally acceptable as a starting point, since it covered the situations recognized by the four 1949 Geneva Conventions and the 1977 Additional Protocols thereto. The definition given by the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Dusko Tadić* case could be used to develop it further. However, the use of the term "hostilities", as in article 73 of the Vienna Convention on the Law of Treaties, instead of "armed conflict" was not desirable, because "hostilities" could apply to a situation that did not reach the level of overt armed conflict.

51. His delegation agreed that draft article 3 should be reformulated for greater clarity but did not support the proposal to replace "ipso facto" by "necessarily"; the two terms were not synonymous and represented a policy choice with substantive impact. The draft article should not rule out the possibility of automatic suspension or termination of a treaty in certain cases, to be treated as exceptions. In order to clarify the position of third States, a study should first be made of customary international law and contemporary State practice on that issue.

52. With regard to draft article 4, the intention of the parties to the conflict at the time of conclusion of the treaty was a relevant factor but might be difficult to ascertain, as States did not generally anticipate armed conflicts or their consequences when negotiating treaties. Malaysia supported the inclusion of other relevant criteria, provided that the order of precedence of such criteria was specified. Clarification would be welcome on how articles 31 and 32 of the Vienna Convention on the Law of Treaties concerning interpretation of treaties could be applied in situations where the treaty was silent on the effects of armed conflict. The suggestion that the legality of the actions of each of the parties should be included as one of the criteria raised the issue of who was to determine legality.

53. His delegation found draft article 5 to be generally acceptable but agreed with the proposal to include a reference to the applicable *lex specialis* and to divide the two paragraphs into separate articles. The proposal to replace the term "competence" with the term "capacity" was appropriate, since "the capacity of States to conclude treaties" was recognized in article 6 of the Vienna Convention on the Law of Treaties, whereas "competence" connoted an element of legal authority that was beyond the powers of the draft article to confer. He agreed with the Special Rapporteur that draft article 6 could be deleted.

54. In relation to draft article 7, his delegation would appreciate an elaboration of the "customary law, or nascent customary law", (para. 209) supporting the list of treaty categories contained in paragraph 2, perhaps applying the methodology used in chapter III of the memorandum by the Secretariat entitled "The effect of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1 and 2). However, in the draft article itself Malaysia would prefer the adoption of a generic approach that identified the relevant factors, so as to allow for greater flexibility, since some treaties might be multi-purpose and might not fall neatly into the demarcated categories.

55. Draft article 8 was generally acceptable, although the suggestion that the concepts of suspension and termination should be dealt with in different articles required clarification. His delegation felt that the treatment of the concepts in articles 42 to 45 of the Vienna Convention on the Law of Treaties need not affect the structure of the draft articles. It agreed with the position stated in draft article 9 favouring the resumption of suspended treaties, although there might be practical difficulties in determining intention at the time the treaty had been concluded; that was another area in which a more detailed analysis of State practice was required. His delegation also agreed in principle on the need for a provision on the legality of the conduct of the parties, addressed in draft article 10, but, again, a more detailed study of contemporary State practice was required.

56. As pointed out in paragraph 6 of the memorandum by the Secretariat (A/CN.4/550 and Corr.1 and 2), effective codification of the topic would require submissions from Governments, particularly concerning their practice after the Second World War. The Commission should prepare a questionnaire identifying the specific areas requiring responses. The working methods of the Special Working Group on the Crime of Aggression were achieving encouraging results and would be a useful model to adopt.

57. Further study was required to determine whether the obligation to extradite or prosecute was a purely treaty-based obligation or a general obligation of customary international law, and, in the latter case, to

specify the extent of that general obligation, in other words, the specific international offences to which it applied. The Commission should strive to canvass the widest possible State practice. Although a detailed analysis of the link between the principle of universal jurisdiction and the obligation to extradite or prosecute would be useful, they were conceptually distinct principles, and the Commission should focus on the latter. Universal jurisdiction enabled the court of any State to try persons for crimes committed outside that State's territory which were not linked to the State by the nationality of the suspect or the victims or by harm to the State's own national interests; the rule had become part of customary international law and was also reflected in treaties, national legislation and jurisprudence in relation to a variety of types of crimes. Under the obligation to extradite or prosecute, the aim of which was to deny safe haven to criminals, a State was required either to exercise jurisdiction (which might include universal jurisdiction in some cases) over an alleged offender of certain categories of crimes or to extradite that person to a State able and willing to prosecute. With the advent of international criminal tribunals, there was another alternative, namely, the surrender of the suspect to such tribunals under the principle of complementarity. Without prejudice to the final form, his delegation supported the proposal to formulate draft rules concerning the concept, structure and operation of the obligation to extradite or prosecute and would provide the Commission with information on its extradition legislation and practice.

58. **Mr. Malpede** (Argentina) said that State bodies and agencies engaged in the formulation, application and interpretation of international legal norms would find much helpful guidance in the Commission's study of the fragmentation of international law (A/CN.4/L.682 and Corr.1 and Add.1 and A/CN.4/L.702) especially as it not only contained a section on case law concerning conflicts between norms but also suggested solutions to certain theoretical issues which had rarely been considered by international courts. The Study Group had been right to focus on five main themes and to use the 1969 Vienna Convention on the Law of Treaties as its point of reference. The conclusions drawn on special (self-contained) regimes were particularly interesting. The Study Group's exposition of systemic integration and of open or evolving concepts merited close attention, as did its examination of the hierarchical relations between norms of international law and the relationship between the decisions of the Organization's principal organs and other norms of international law. The conclusions contained in chapter XII of the Commission's report and the study on which they were based should therefore be widely circulated so as to foster a better understanding of ways to approach fragmentation.

59. **Ms. Spinaru** (Romania) said that codification of the law of transboundary aquifers would contribute significantly to the development of international environmental law. Draft article 4, predicated on stewardship of the planet's resources, was excellent, but the lack of a definition of "precautionary approach" in draft article 11, of "significant harm" in draft article 6 and of "significant adverse effect" in draft article 14 would leave the door open to varying interpretations and would affect the integrity of the whole text. For the same reason, it was necessary to specify what kind of conduct would qualify as "precautionary" and what consequences failure to engage in such conduct would entail. She was curious to know how the Commission would link the subject of aquifers with those of other natural resources such as raw materials, gas and oil. Incorporation of the draft articles in a convention would be the only way to achieve the goals envisaged by the Special Rapporteur.

60. Regarding the topic of responsibility of international organizations, she said that, although self-defence, necessity or distress were circumstances precluding the wrongfulness of acts by States, it was hard to see how they could be applied to international organizations. The Commission should therefore provide examples of instances in which those principles had been extended to cover international organizations. Member States and international organizations held distinct and separate responsibilities. Membership alone was insufficient reason to hold a State responsible for an internationally wrongful act committed by an organization to which it belonged. The State would have to play an active role in the commission of the wrongful act in order to bear responsibility for it. There was no legal basis for requiring member States to pay compensation to an injured party if the organization responsible for the internationally wrongful act was not in a position to do so. A State could, however, as a charitable act, offer, pecuniary remedies for the injured party's sufferings. On the other hand, since some international

instruments contained provisions on cooperation to bring to an end, through lawful means, a serious breach of an obligation under a peremptory norm of international law, it would be worth incorporating such a provision in the draft articles on responsibility of international organizations.

61. As far as reservations to treaties were concerned, reservations to normative treaties, including human rights treaties, should be subject to the same rules as reservations to other types of treaties. While it was imperative to abide strictly by the whole body of human rights standards, no attempt should be made to establish a hierarchy of international legal norms according to their subject matter. The monitoring bodies referred to in draft guidelines 3.2.1 and 3.2.2, should be entrusted with the task of ruling on the status and consequences of a particular reservation, because national monitoring bodies were normally responsible for supervising the implementation of conventions and a reservation could be regarded as an exception to the applicability of a convention. The most important criterion for evaluating the permissibility of a reservation was the intention of States when the treaty was concluded. If the convention was silent on the matter of reservations, their permissibility should be judged in the light of the object and purpose of the treaty.

62. The ten Guiding Principles which constituted the final product of the Commission's work on the topic of unilateral acts of States would be of great value as a guide to international-law practitioners.

63. With respect to the draft articles on effects of armed conflicts on treaties, she observed that the definition of "treaty" should reflect the fact that international organizations could conclude treaties. For the purposes of the draft articles, the term "armed conflict" should be understood to cover non-international armed conflicts because, over the past twenty years, most armed conflicts had been internal. In draft article 3, the expression "necessarily" would best convey the idea that some armed conflicts would lead to the termination or suspension of treaties, while others would not. The main criterion for determining if that was the case should be the parties' intention upon conclusion of the treaty. Any listing in draft article 7 of categories of treaties which would remain in operation during an armed conflict would be open to a variety of interpretations which would detract from the substance of the whole topic.

64. In response to the Commission's questions regarding the topic of *aut dedere aut judicare*, she said that, under the law of her country, Romanian citizens and persons who had been granted political asylum could not be extradited. Exceptions to that rule were allowed, but only on certain conditions and only in accordance with the international conventions ratified by Romania. If the extradition of someone from those two categories of persons was refused and if the requesting State so desired, the case had to be brought before the competent Romanian authorities with a view to the commencement of legal proceedings. If the extradition of a foreign citizen was refused, criminal proceedings were initiated immediately subject to certain conditions. Thus, in Romania, the obligation to extradite or prosecute applied differently to nationals and foreign citizens. In practice, the authorities of her country had so far granted all the requests they had received for the extradition of foreign citizens, but they had preferred to try Romanian citizens before the national courts.

65. The *aut dedere aut judicare* obligation was to be found in various international treaties and it had started to shape States' conduct with regard to the most heinous international crimes. Any study of the topic should be confined to the "double alternative" and should disregard the third possibility of handing over the perpetrators of international crimes to international tribunals.

66. The Study Group exploring the topic of fragmentation of international law had produced a fascinating and thought-provoking report which should prove to be a useful tool for international legal practitioners.

67. **Mr. Kanu** (Sierra Leone) said that, while to most of the draft articles on diplomatic protection adopted by the Commission merited support, draft article 18 was silent on the protection available to the crew of a ship which had connections with several States. If a crew member of one such ship was injured, against which country should the action be brought? In which forum must he exhaust local remedies? His delegation believed that, given the unresolved problems, the time was not yet ripe for drawing up a convention on the basis of the draft articles.

68. Caution was needed if the draft articles on responsibility of international organizations were to be modelled on the articles on State responsibility for

internationally wrongful acts, because the nature and character of international organizations differed from those of States. Draft articles 17 to 24 on State responsibility could not therefore be applied by analogy to organizations. While he welcomed the tenor of draft articles 28 and 29, he believed that the Commission should also consider situations in which States were not deemed responsible for the acts of organizations. Moreover, there was no legal basis for an obligation on the part of States to pay compensation for an internationally wrongful act of an organization to which it belonged, if the organization was not in a position to do so.

69. He commended the work done by the Special Rapporteur on the topic of the fragmentation of international law and welcomed the Commission's conclusions on that subject. Although fragmentation had negative and positive effects on the application of the principles of international law, article 31 of the 1969 Vienna Convention on the Law of Treaties provided international lawyers with an invaluable instrument for reconciling the different rules resulting from diversification. The recommendation made in paragraph (42) of the Study Group's conclusions (A/CN.4/L.702) was sensible in the current circumstances.

70. The Commission had adopted an excessively narrow approach to the topic of effects of armed conflicts on treaties by considering only the impact of international armed conflicts and failing to examine situations in which there was international involvement in ostensibly national conflicts. Such exclusion would have adverse repercussions on its future work.

71. Turning to the topic of *aut dedere aut judicare*, he encouraged the Commission to draw a distinction between the principle of universal jurisdiction and that of *aut dedere aut judicare* and to pinpoint the similarities and differences between them. Furthermore it should offer States guidance as to whether they should extradite or prosecute. If *aut dedere aut judicare* was not an obligation under customary international law, what was its legal basis? The Commission should endeavour to provide an answer to that question. His own Government would face substantial difficulties if it had to apply that principle in its national courts, as Sierra Leone was a party to many international treaties which had to be incorporated into national law before they could be relied upon in court. His Government was currently being assisted by the United Kingdom and the Commonwealth with the passing of such legislation, and it looked forward to the time in the not too distant future when it would be in a position to extradite or prosecute the perpetrators of crimes which offended the conscience of humanity.

72. He proposed three topics for consideration by the Commission: the legal consequences arising out of the use of private armies in internal conflicts; the legal consequences arising out of the involvement of multilateral corporations in internal conflicts; and the legal consequences arising out of the involvement of security agencies in internal conflicts. The recent experiences of his own country and of Liberia and the Democratic Republic of the Congo warranted the consideration of those topics by the Commission. The 1949 Geneva Conventions and the Additional Protocols thereto were signed by States. It was therefore unclear if and to what extent they applied to the entities he had just mentioned.

73. **Mr. Pambou-Tchivounda** (Chairman of the International Law Commission) said that the Commission looked to the Sixth Committee in order to obtain Governments' reactions to the general thrust of its work and, more specifically, to the various issues raised by the topics on its agenda. He therefore requested that Governments should forward their written comments on the first-reading version of the draft articles on shared natural resources and their replies to the diverse questions put in chapter III of the Commission's report.

The meeting rose at 1.15 p.m.